

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

GARY K. NELSON, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

August 13, 1970

DEPARTMENT OF LAW LETTER OPINION NO. 70-7-L (R-53)

REQUESTED BY: THE HONORABLE WELDON P. SHOFSTALL
Superintendent of Public Instruction

QUESTIONS: 1. May members of an Advisory Council, which meets from time to time to advise the staff of the Department of Education working under ESEA Title III, receive compensation from the Department for services rendered by them if those members also are employees of Arizona State University, or Northern Arizona University or a common school district?

2. Would the answer to Question 1 be affected if the member of the Advisory Council is also the Superintendent of the Arizona State School for the Deaf and the Blind?

ANSWERS: 1. See body of opinion.
2. See body of opinion.

I

In answering these questions Article 22, § 17 and Article 4, part 2, § 17 of the Arizona Constitution and A.R.S. § 38-601 must be considered and, therefore, are set forth below.

Art. 22, § 17. Compensation of public officers

Section 17. All State and county officers (except notaries public) and all justices of the peace and constables, whose precinct includes a city or town or part thereof, shall be paid fixed and definite salaries, and they shall receive no fees for their own use.

Art. 4, Pt. 2, § 17. Extra compensation prohibited; increase or decrease of compensation during term of office

Section 17. The Legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer, other than a justice of the peace, be increased or diminished during his term of office; provided, however, that when any legislative increase or decrease in compensation of the members of any court or the clerk thereof, or of any board or commission composed of two or more officers or persons whose respective terms of office are not coterminous, has heretofore or shall hereafter become effective as to any member or clerk of such court, or any member of such board or commission, it shall be effective from such date as to each thereof.

§ 38-601. Effect of payment of legal salary

State or county officers, employees, members of boards and commissions, and deputies, stenographers, clerks and employees of any such officer, board or commission, or of any institution, shall receive the salary provided by law, and shall not, under any pretext, receive any salary or emolument in excess of the salary so provided.

In a letter dated January 6, 1966, to Major General Joe Ahee, the Adjutant General of the State of Arizona, we stated the following with regard to the above-quoted provisions:

This office has taken the position on several occasions that the quoted provisions do not necessarily prohibit dual compensation for two separate public positions provided the two

*

positions are not incompatible with each other within the meaning of Coleman v. Lee, 58 Ariz. 506, 121 P. 2d 433, and provided the additional compensation is not payable for the performance of the regular duties of the first office within the meaning of Pima County v. Anklaam, 48 Ariz. 248, 61 P. 2d 172. However, where a public officer or employee seeks to collect additional compensation from public funds for performance of the same work or duties, §38-601 prohibits such extra compensation.

With regard to A.C.A. § 12-709 (1939), which is the predecessor of A.R.S. § 38-601, in Opinion No. 51-306, dated November 21, 1951, we said:

The prohibition contained in this statute, we believe, is a prohibition against the payment of salary claims when an official or employee draws or attempts to draw compensation for his regular employment in addition to that fixed by law for his duties, either by (a) an increase for those duties alone, or (b) by an increase for some addition to those duties. . . .

In Opinion No. 62-70-L, in which we determined that a doctor could act as Health Director and also treat indigent patients in his private practice so long as he does not treat the patients during the hours of the day when he should be acting as Health Director and so long as such treatment is not one of the duties of the Health Director, we said:

This section has been interpreted to mean that a county employee may not receive additional compensation for duties for which he is already being paid, but that he is not prohibited from earning additional monies for work not encompassed in, and not conflicting with, his duties, Coleman v. Lee, 58 Ariz. 506, 513, 121 P.2d 433, Pima Co. V. Anklaam, 48 Ariz. 248, 61 P.2d 172.

Also, the duties of one job should not be such that it is physically impossible for the employee to carry out the other, see Perkins v Manning, 59 Ariz. 60, 122 P.2d 857.

It is, therefore, our opinion that the Department of Education may pay members of the Advisory Council compensation, in addition to the compensation they receive as employees of Arizona State University, or Northern Arizona University, or a common school district, for services rendered as members of the Advisory Council only if the Department of Education first determines:

1. That the duties to be performed and the services to be rendered by the member of the Advisory Council are not incompatible either in fact or in law, with the duties to be performed and the services to be rendered by that member as an employee of Arizona State University, or Northern Arizona University, or a common school district; and

2. That the duties to be performed and the services to be rendered by the member of the Advisory Council are not germane to the duties to be performed and the services to be rendered by that member as an employee of either Arizona State University, or Northern Arizona University, or a common school district.

To assist the Department of Education in making the above determination, we set forth the following guidelines:

1. Incompatibility of offices or positions:

A. The employment contract or the applicable statutes with regard to the first position must not contain provisions which prevent employment after normal working hours.

B. The performance of the duties of the second position must not in any way interfere with the performance of the regular duties of the first position.

C. It must not be impossible to perform the duties of both positions. This refers not only to a physical impossibility, but also to an inconsistency in the functions of the two positions such as when one is subordinate to the other or when a contrariety and antagonism would result in an attempt by one person to discharge faithfully and impartially the duties of both. The duties performed in the second position must not be performed during the normal working day of the first position unless the member is on vacation or leave time.

D. Two positions are incompatible when the holder cannot in every instance discharge the duties of both.

2. The duties of one position are germane to the duties of the second position if:

A. The duties of the first position are allied, relevant, appropriate, or pertinent to the duties of the second position.

B. One reasonably might expect a normally conscientious holder of the first position to perform, in his first position, the duties proposed for the second position.

Because of the variety of possible situations, each case must be judged on its particular facts and, therefore, the above criteria are intended to serve as guidelines and are not intended to be the exclusive criteria for determining whether one individual may receive compensation for two positions.

II

The fact that one of the members of the Advisory Council is also the Superintendent of the Arizona State School for the Deaf and the Blind is not conclusive, but merely presents

Opinion No. 70-7-L
(R-53)

August 13, 1970

Page Six

separate and distinct facts which must be considered by the Department of Education in order to determine whether an incompatibility of offices or positions exists which would make it unlawful for the Superintendent to receive compensation as a member of the Advisory Council.

Respectfully submitted,

Gary K. Nelson
by F.S.

GARY K. NELSON
The Attorney General

GKN:NCG:ell